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IN THE

Supreme Court of the United States

October Term, 1969

No. 28

UNITED STATES OF AMERICA,
Appellant,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES 230 PACIFIC NORTHWEST SHIPPERS

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STATEMENT

This brief is on behalf of 230 Pacific Northwest Shippers and shipper organizations who are fully identified in the record in the Commission and also in their answer filed in the District Court (App. 1312-1324). These shippers and shippers' organizations are, as the Commission noted, "located mostly in Washington and Oregon" (App. 268) with branches or operations in other Western states and in British Columbia, Alaska and Hawaii. The scope and interest of these shippers may be capsulized as follows:

13 Associations of Shipping Groups or Ports
30 Potato, Onion or Fresh Fruit and Vegetable Shippers
55 Wholesalers, Jobbers or Distributors
5 Lumber or Related Product Shippers
12 Clothing Manufacturers
17 Department Store or Retail Chains, etc.
5 Peat Moss Shippers
6 Evergreen or Christmas Tree Shippers
16 Fish or Fish Product Shippers
36 Furniture or Mattress, etc., Manufacturers
35 Miscellaneous Manufacturers in the Northwest and West

230 Total Shippers and Shipper Groups[1]

These 230 shippers and shipper organizations have actively participated in this case, with their own witnesses and counsel, since April 2, 1962. From the outset we strongly supported the merger of the applicants but we firmly opposed them in their resistance to certain conditions sought by the Milwaukee Road. However, in July 1966, following the initial decision of the Interstate Commerce Commission, the applicant lines asked the Commission to reconsider its decision and at that time they adopted what has essentially been the position supported and defended by these shippers since 1962.

Accordingly, in October 1966 these shippers independently, but joined by many other parties, strongly urged the Commission to reconsider and reverse the initial decision (App. 268). The Commission proceeded "to reexamine each and every issue of substance and to weigh carefully every potential advantage and disadvantage that may reasonably be expected to result from the pro-

1. These 230 listings include six shippers' associations which alone ship over 16,000 carloads of freight a year (Ex. 103, pp. 2-6).

posed unification" (App. 273). As the District Court noted (App. 18-19, 22), the Commission reconsidered the benefits to shippers and concluded:

> "Like the many shippers who support the applicants and who do business in the said States, and like the numerous States, State and Federal agencies, communities and shipper groups which have dropped their opposition and now favor the merger, we see this transaction as a means for achieving, through appropriate conditions, overriding benefits to the public through improved transportation." (App. 344)

From the outset we have agreed with the Commission that there is no legal presumption that a proposed merger is justified. For that reason we entered the case with counsel and witnesses to represent and demonstrate our needs.[2]

This record, which contains 15,000 transcript pages and 240 exhibits, includes testimony of nearly 300 other individual shippers and receivers of freight (in addition to our group) who testified at the hearings held in 16 cities.

The hundreds of shippers who testified and participated at the hearings overwhelmingly supported this merger. That support increased after the applicant lines agreed to conditions for the Milwaukee and North Western because of the increased public benefits that those conditions will produce. The position of the Department of Justice conflicts sharply, for example, with that of the Department of Agriculture which withdrew its initial opposition and said that this merger as conditioned will produce benefits to the public and the agricultural com-

2. See the transcript at pp. 7097-7217 and Exhibit No. 103, pp. 1-48.

munity.[3] The Department of Agriculture, unlike the Department of Justice, is a very large shipper. The other large government shipper, the Department of Defense, in no way opposes this merger, and the Commission found this merger "will provide . . . an increased capacity to serve the national defense" (App. 311).

The shippers who testified offered innumerable, detailed examples of how their businesses are disadvantaged by the present situation and of how a conditioned merger will help them. To support the general proposition that railroad competition is important, the Department of Justice has cited testimony of four of the witnesses for our shipper-appellees (D.J. Br. 60 and fn. 47). Those witnesses testified strongly in favor of the merger of the applicant lines and conditions, such as entry of the Milwaukee Road into Portland, that will create new and better railroad competition.[4] Our shippers were well aware that the merger would eliminate competition between the Great Northern and Northern Pacific. But we are also aware that the strong competition of the Union Pacific and other railroads will continue in the Northwest; that the conditions for the Milwaukee will strengthen it and extend its services into new cities and markets; that the competition of trucks and other modes is strong

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3. Reply of Secretary of Agriculture to Applicants' Petition for Reconsideration, pp. 1-2 (Oct. 24, 1966).

4. See Tr. 7100-7101, 7124-7129, 7139-7142, 7156-7159. The Commission, having been initially persuaded by the Department's references to shipper testimony on competition, noted in the Second Report that the testimony referred to actually refuted the Department's assertion because the competition that the shippers needed and asked for was the competition that only the merger as now conditioned can provide (App. 320).

and getting stronger; and that the service improvements and benefits of the merger will make our products more salable and competitive in the distant consuming markets.

What the Department's reference to our testimony really shows is that we were well aware of the value of competition and that we concluded that the loss of com-- petition between Great Northern and Northern Pacific will be more than offset by the shipper benefits, a more competitive Milwaukee Railroad, and a better and more efficient use of railroad property.

We cannot accept the view that shippers and receivers are not entitled to the advantages of this merger unless and until the railroads are deemed to be in "precarious financial condition" or "unable to furnish adequate transportation service" (D.J. Br. 58, 61). Nor can we accept the view that if this merger is allowed, any other rail merger can and must be approved (D.J. Br. 61). Here we have a merger that yields extensive benefits to shippers, both with continued rail competition from other roads including the Union Pacific and a Milwaukee that will be greatly improved, and with continued intense and increasing competition from trucks and other modes. And the merger advantages will be obtained without jeopardizing or having a significant adverse effect upon the operations of other railroads (App. 328, 333-334, 338). In our view, to deny this merger as approved, with public advantages so well-established and substantial, would defeat the purpose of Section 5(2) of the Interstate Commerce Act.[5]

In this brief we will focus primarily on the shipper

5. *Penn-Central Merger Cases*, 389 U.S. 486, 492-493 (1968).

aspects of this case and review the well-supported findings of the Commission which show why this merger is needed and is in the public interest.

ARGUMENT

I. The Shippers and the Public Will Benefit Very Substantially from this Merger

As the District Court pointed out (App. 6, 15), the Commission carefully considered and made findings concerning the extensive and important shipper and public benefits of the merger and the prescribed conditions (App. 305-311). The Department of Justice does not describe the benefits in any meaningful fashion and then dismisses them as "purported" or "conventional" (Br. 20, 56, 61). This is directly contrary to the evidence and the explicit findings of the Commission.

Furthermore, many of the most important benefits of this merger and its conditions depend upon tariffs already submitted and to become effective when the merger is consummated. This can be seen from the Third Report on Reconsideration (App. 498-503) which refers to some of the new tariffs that the merging lines filed in anticipation of merger. There the Commission reviewed a new tariff and routing guide and ordered the applicant railroads "promptly to revise" it to increase the newly created Milwaukee competition on grain traffic (App. 503). These and other new tariff and routing provisions, which will immediately benefit shippers, remain ineffective only because the merger has not been consummated.

A. Additional routes and transit privileges. Merger will,

as the Commission explained, automatically remove the existing barriers and open new markets and sources of supply:

> "Shippers would have the benefit of additional routes over New Company's lines in any combination with intermediate junctions opened to form cross-over routes between the Northern Lines, and between those roads and the Burlington at Billings and Sioux City. These are routes which have historically been closed to retain to each of the Northern Lines its long haul. The resulting wider choice of routing increases such attendant shipper benefit as transit, partial loading and unloading, and diversion and reconsignment. The expansion of transit privileges benefits producers and processors of numerous commodities important to this area, including lumber, grain, feed, fertilizer, and iron and steel, and ingredients and products made from those commodities." (App. 308)[6]

The Examiner had reviewed, with respect to such commodities, how the increased transit and routing privileges would reduce shipping costs and open important new areas (App. 727-732). Among the supporting testimony was that of these shipper-appellees (Tr. 7100, 7113, 7126, 7168, 7169-7170).

B. Faster and more dependable freight schedules. The merged lines will use the shortest and best routes of all four railroads (App. 306). For example, the applicants' best general freight service time from Seattle will be cut by about 11¾ hours to Chicago and by about 20

6. And, as the Commission added: "Here again, the benefits from the opening of the various gateways to the Milwaukee and the North Western multiply, not only from the competitive standpoint but from the standpoint of actual service to shippers and the elimination of artificial barriers to the development of new markets, services, and sources of supply." (App. 308)

hours to St. Louis. The Commission properly found the faster and more dependable service is "*extremely important* here in view of the long distances involved and the nature of the products of the Northwest" (App. 305, emphasis added; and see App. 718-727).[7] The present, limited expedited freight service should also improve (App. 467-468).[8]

It is contrary to the needs of shippers, the evidence and the explicit findings to imply that such benefits are unimportant or conventional.

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7. The record is replete with detailed supporting evidence but the following is an example of testimony offered by one of our witnesses, the chairman of the Northwest Fish Traffic Committee. He pointed out that fish are subject to intense market competition with poultry and other protein products at distant points, and said: "Fish is an exempt product. At the present time the trucks, because of faster schedules and lower costs, have 50 per cent of our Midwest business. Trucks today are at least one day faster, and in some cases three or four days faster than rail to Chicago and the Midwest. Anything that improves the efficiency of the railroads will tend to recover that trucking business for we much prefer rail cars to trucks. We believe the merger is the most constructive approach that has been suggested in recent years. We believe the railroads running over their best tracks between here and Chicago will give dependability with more speed." (Tr. 7158)

8. In attempting to dismiss the faster and more dependable service that will be available over the shorter, more interchange free routes of the new company, the Department states that some time ago "the Northern Lines began operating faster transcontinental freight service, in response to a competitive effort by the Milwaukee . . ." (D.J. Br. 59). What this does show is that the Milwaukee already is an effective competitive force. (See other examples of Milwaukee's competitive effect in Ex. 103, p. 37.) And the Milwaukee will be an even greater force when, with entry into Portland and the benefit of other merger conditions, it becomes a transcontinental rate-making line. Moreover, the Department does not mention that the present limited, "expedited" service has required the use of less economic, shorter, heavy-powered trains. The Commission was aware of this when it pointed out the error "in comparing the individual applicants' present expedited schedules for short, light-tonnage trains pulled by high-horsepower locomotives, with schedules of normal trains providing general freight service, without taking into consideration the shorter and more efficient routes and more dependable schedules the merger will make possible for the normal trains." (App. 467-468)

The availability of alternate routes for applicants, especially across the Cascade and Rocky Mountains, will reduce the "wash-out" delays of today, reduce rail traffic congestion and reduce damage and market decline claims (App. 307, 309). Time is gained and dependability increased by the elimination of interchanges and concentration of car weighing and grain and federal car inspection.

C. Automatically reduced rates. As the Commission said, "Shippers now utilizing the service of more than one applicant in joint-line movements will derive benefits from generally lower single-line rates . . ." (App. 309-310; *e.g.*, Tr. 7170). Log, grain, wood chips, sand and gravel, and other carload rates apply only over one line in the Northwest in many cases. Merger will make all shipments between points on all applicant lines (GN, NP, SP&S and Pacific Coast) subject to "one-line rates" if merger is approved. These lower "one-line rates" will replace the higher combination rates which apply now on such through traffic between the GN and NP, etc.

D. Shipper benefits from applicants' savings. A $40 million per year savings is a huge reduction in operating costs. It is twice as large as the savings in the *Seaboard-Coast Line* merger case (320 I.C.C. 122, 159). Our testimony showed the direct relation between the railroads' costs and their rate levels (Ex. 103, pp. 7-8). The Commission considered the matter and said, for example:

> "Thus, applicants' ability to operate more efficiently and at lower cost should be reflected in the service and rates afforded shippers and receivers." (App. 305, 305-306)

The merger can offset millions of dollars of future shipper freight costs or be a basis for freight rate cuts. In the last two years there has been a series of railroad cost-oriented general rate increases that shippers have been forced to pay and bear (*Ex Parte No. 256, Increased Freight Rates, 1967*, 329 I.C.C. 854, 332 I.C.C. 280; *Ex Parte No. 259, Increased Freight Rates, 1968*, 332 I.C.C. 590, 332 I.C.C. 714). The Department's assertion (Br. 56) that the merger savings will not "necessarily" be passed on to shippers is generally contrary to the cost principles used in such railroad rate proceedings.

Moreover, the Department does not mention that the rates of return on the Northern Lines are lower than the low average for all Class I railroads (App. 299). The Department suggests (Br. 20, 56) that merger savings are unimportant and might be used for non-railroad investment. This is directly contrary to the basic economic principle, explicitly recognized by the Commission here, that continued low returns are likely to *discourage* investment in railroad properties:

> "Upon merger, the relatively low rate of return will be enhanced. *Low rates of return, if continued, may well pose serious obstacles in attracting necessary investment capital, and affect reinvestment decisions by the rails as well.* (App. 299; emphasis added)[9]

> "Here, we are convinced that they [the merger savings] would be substantial and of sufficient amount to justify the merger, both in terms of enabling the merged company to improve its service to the public and of providing a return on investment more nearly commensurate with the investment requirements of a viable and progressive transportation system." (App. 304-305)

9. See *Penn-Central Merger Cases*, 389 U.S. 486, 500-501 (1968).

E. Increased and better car supply. Car supply is a chronic problem in the western part of the nation. The Commission found:

> "Through the faster turnaround time made possible by shorter routes and facilitated terminal handling, it is anticipated that 639,097 car days (the equivalent of 1,750 cars daily) would be saved, with a savings of 61,555 car days merely through the elimination of duplicate reserves (held on shippers' orders) at 14 of 36 points served by more than one of the applicants." (App. 309; see generally App. 732-737)

With respect to the benefits of pooling all the equipment on the four lines, the Commission noted that "boxcar requirements reach their peak at different times on applicants' lines, but so close that one is reluctant to release cars to another" (App. 309). Also, under the car service rules, Eastern railroads will have to return empty cars to the merged lines much faster because of new direct "home" points such as Chicago, Peoria, St. Louis and Kansas City (App. 309).

New cars, needed today to serve customers, are generally purchased only when railroad business is good. The new company, because of greater earning ability, will be able to buy them when needed without being so predominantly dependent on current earnings.

F. Other benefits. The shipper's time is money to him. With merger one call will trace or place a car order or divert a car order where three or more calls are required today to separate railroads (App. 310). Concentrated traffic department headquarters will speed rate traffic

matters.[10] By merger, one switch crew, not two, will switch plants on the merged line. This will eliminate plant loading track disruptions where one line has followed the other in.

The consolidation of certain separate passenger depots and other changes such as the construction of a new railroad overpass viaduct in Spokane will produce real estate and street benefits:

> "Elimination of duplicate facilities at some common points would release desirable real estate for productive development, and various communities, particularly Spokane, would benefit by elimination of or substantial reduction in street hazards and congestion." (App. 310)

If the merger is approved, millions of dollars in new construction in bridges, terminals, etc. will commence. For example, new rail yards will be constructed at Spokane and Seattle (App. 306-307).

II. The Conditions for the Milwaukee Road Increase and Multiply Shipper and Public Benefits

Abundant evidence proves the correctness of the Commission's finding that: "By virtue of the conditions being imposed here for the benefit of other railroads, particularly Milwaukee and North Western, those carriers will not only benefit in their own interest as railroads but will be in a position to pass on the benefits so realized to the shippers and areas they serve" (App. 310-311).

There is, as the Commission held, a striking contrast between the effects of denying and the effects of approving this merger:

10. One call and one meeting can replace two or three calls and negotiations now. As all railroads make their rates by bureaus (under anti-trust exemption), this will not affect competition but will speed up the rate publication process.

"Denial of the applications for the purpose of preserving competition between the Northern Lines would merely perpetuate the existing dominance of the GN and NP in the northern tier, with the Milwaukee, despite shorter routes and superior grades, left to its comparatively small share of the market. *Preservation of the competitive status quo would, in our view, relegate the Milwaukee to an increasingly marginal and deteriorating role.* On the other hand, a properly conditioned merger, with NuCo competing against a strengthened Milwaukee, will serve to enhance rail competition, achieve a more desirable competitive pattern, while at the same time conferring substantial benefits upon the shipping public throughout the territory involved in this case." (App. 321; emphasis added)

Shippers will get a better Milwaukee Railroad, serving the West on a fully competitive basis. The merger conditions will increase Milwaukee's revenues by $15 million per year, open vast new traffic potentials in California, Oregon and British Columbia, due to new trackage rights into Billings, Portland and Sumas (Canada). It will have the ability to build more cars and do a better railroading job than it is doing or can ever do under the *status quo.*

A. Access to Portland and Sumas: A new east-west and north-south railroad. The trackage rights for Milwaukee into Portland will create a Portland gateway with the Southern Pacific, the Union Pacific and the merged lines. This will enable through rates and routes for the Columbia Basin, Whatcom County, and other places for points in California, Arizona, etc., with good service for Milwaukee's shippers that is almost non-existent today. At present the Milwaukee's shippers and service areas are clearly "paying the price of its inability to

reach Portland (except through a left-handed interchange with Union Pacific at Marengo)...."[11]

The Milwaukee will also have trackage rights over the merged company's fast, direct route to the Milwaukee's Canadian gateway at Sumas. Today Sumas service involves intolerable delays and three interchanges over a slow, circuitous route. Whatcom County and Northwest Washington will benefit tremendously by lower rates, through rates and fast service. The new Sumas route will also vastly improve service to New Westminster, Vancouver, and the Fraser River Delta area.

Canadian service will be better and more competitive than it is today. The Province of British Columbia supports the proposed merger (App. 268) and fought hard to get the Sumas gateway condition.

As the Commission found:

> "Thus, the Milwaukee, by reaching Portland directly, will be a rate-making transcontinental railroad, not only on traffic moving across the northern tier, but to and from California as well. Likewise, the Sumas condition will allow the Milwaukee to provide rail competition on traffic to and from Canada." (App. 311)

B. Opening the Spokane gateway and 10 other new transcontinental gateways: New flexible routing and markets. The conditions will open 11 new reciprocal trans-

11. App. 180 (dissent from the First Report of the Commission). Our testimony (Ex. 103, pp. 33-34; Tr. 7100-7101) in support of Portland entry for the Milwaukee was among the evidence showing that: "Under the *status quo*, the Milwaukee is destined to a marginal and steadily deteriorating existence. . . . What Portland traffic it now has is shown to come from loyalty for its past efforts and hope for its improved future as a result of these proceedings, but, in ultimate self-interest, its Portland supporters cannot stay with it unless relief is forthcoming here." (App. 180-181)

continental gateways west of Minneapolis with the Milwaukee Road plus two with the North Western (at Oakes, North Dakota, and Crawford, Nebraska). This "will give many shippers a realistic choice of railroads for the first time in history" (App. 311):

> "Not the least of the benefits thereof will be the opening of new markets, transit points, and sources of supply for shippers and receivers located on applicants' lines who cannot now reach points on the Milwaukee not served by applicants, and those located on the Milwaukee to whom applicants' lines are now closed. The same purposes, on a smaller scale will be served by opening two gateways to the North Western at Oakes and Crawford." (App. 311)

From "the standpoint of actual service to shippers" these gateway conditions will "multiply" the new markets and sources of supply opened by the merger of applicant lines (App. 308).[12]

C. Access to Billings, Montana. The merged lines give the Milwaukee full operating rights over trackage serving Billings. Thus, Milwaukee would for the first time reach Montana's second largest city and eastern trading center. New traffic to, from and through that city would be available. This will enable shippers to serve Billings on many stop-off cars that cannot do that today (App. 307). It will help Milwaukee shippers to serve their customers better.

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12. The Milwaukee has litigated and failed in attempting to open such gateways. See the Spokane Gateway case: *Chicago, M., St. P.& P.R. Co. v. Spokane, P.&S. Ry. Co.*, 300 I.C.C. 453 (1957), sustained *sub nom. Chicago, M. St. P & P. R. Co. v. United States*, 182 F. Supp. 81 (E.D. Wis. 1960), affirmed 366 U.S. 745 (1961). See also *Seaboard Air Line R. Co.–Merger–Atlantic Coast Line R. Co.*, 320 I.C.C. 122, 182, 184-185 (1963).

• • •

The conditions imposed for the benefit of the Milwaukee and its shippers are, as the Commission recognized, profoundly needed, creative and constructive. They are clearly neither unimportant nor "conventional." They have been fashioned and won only after long and heated debate. They, together with the benefits of the merger itself, warrant the affirmance of this Court.

III. The Effects on Employees That Influenced the First Report Have Been Eliminated

In the First Report the majority considered "the adverse effects of the merger on carrier employees" and concluded that those effects were a disadvantage weighing significantly against approval of the merger (App. 166-167).[13] The District Court properly observed that the adverse effects on employees had been one of the basic factors weighed in the First Report and that subsequently those effects had been eliminated in a satisfactory resolution of the employee problem (App. 18, 22). The Department hardly mentions (Br. 14, fn. 7) this important change although it obviously was a reason why a re-evaluation of the merger, including the amount of the merger savings, was appropriate and directed by the Commission.

Not only was the employee problem resolved but the desirable effects of that resolution are noteworthy. The employee protection now "afforded, providing as it does job security as well as monetary benefits, could hardly have been achieved except for the merger" (App. 326).

13. As stated in the Second Report, the Commission had originally "found that there would be substantial hardships inflicted upon carrier employees through loss of jobs . . ." (App. 249).

The Commission pointed out:

> ". . . the salutary effects of the employee protective agreements (described in the reconsideration report)[14] upon the employees themselves and upon the economy of their localities. Employment is largely guaranteed. No employee will lose his job or be placed in a worse position with regard to his employment as a result of the merger. Protection is also extended to persons on furlough or leave of absence. Elimination of redundant jobs will occur over a period of time and will be solely by normal attrition, i.e., resignation, retirement, death or discharge for cause; . . ." (App. 468)

IV. The Commission Has Realistically and Carefully Analyzed and Weighed the Competitive Effects of the Merger

A. Rail competition. As the District Court said, the "Commission analyzed at length the competitive situation," and that analysis is supported by "tremendous detail related to the effect of the merger on competition" (App. 15, 22). The Department, however, would create the impression that the Commission considered only "the competitive effects systemwide" and not the competitive effects within the Northern Tier (D.J. Br. 12, 39, 41, 47). The fact that the Commission described and reviewed facts pertinent to one area (systemwide competitive effects) certainly does not mean that the Commission failed to consider separately facts pertinent to another area (Northern Tier competitive effects). Throughout the proceedings the Commission devoted extensive consideration to "the northern tier States of Minnesota, North Dakota, Montana, and Washington. . ." (App. 316). If the Commission had not also considered

14. See generally App. 323-328 and Condition 34, App. 456.

the systemwide situation, it would have failed in its responsibilities.

One aspect of the Commission's consideration of the Northern Tier involves the evidence showing that rail competition will continue at all but a few points in that area and that those points account for only 6 percent of the Northern Lines' revenues (App. 316, column A of table). The largest city at which this merger *would* have eliminated rail competition was Billings, Montana, with a population of about 58,000. Now, however, even that will not happen since the conditions guarantee the Milwaukee will also serve Billings. This is a better result from a shipper service standpoint than the *Seaboard-Coast Line* situation. There rail competition was eliminated at Tampa, Florida, with a population of about 300,000.[15]

The District Court properly cited, from the Commission's Second Report, five illustrations of the "weakness" of some "raw statistics" invoked to inflate the anti-competitive aspect of this merger (App. 24-25). An additional matter concerns the use of figures artificially limited to traffic moving between the Northwest and the Twin Cities (D.J. Br. 10, 38, 42). That narrow definition excludes all the traffic of railroads that compete very effectively for the same east-west traffic but that do not physically transport it through the Twin Cities. In fact the exhibit and sources from which the Department has extracted its percentages actually show that the strong

15. *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line R. Co.*, 320 I.C.C. 122, 164-166, sustained *sub nom., Florida East Coast Ry. Co. v. United States*, 259 F. Supp. 993, 1005 ("a 'monopoly' would be created in parts of Florida"), affirmed *per curiam* 386 U.S. 544.

Union Pacific carries over 25 percent of that traffic to and from the Northwest. It is only by a recalculation of percentages that the Department has avoided mentioning the Union Pacific (Ex. 99, p. 12). The Union Pacific is clearly a strong competitive force in the Northwest, as its share of the east-west traffic indicates, and it maintains highly competitive freight schedules (Tr. 7194-7195). The Union Pacific's competitive interests led it to participate in this proceeding and to contend that the Milwaukee should not be given trackage rights into Portland (App. 333-334).

The Department, having opposed the *Seaboard-Coast Line* merger, contends that the "Northern Lines' only rail competition in the Northern Tier comes from the relatively weak Milwaukee, as contrasted with the powerful Southern in the Seaboard-Coast Line case. . ." (D.J. Br. 21). This comparison fails to take into account: (1) the effective competitive force of other railroads including the Union Pacific as described above;[16] (2) the fact that under the merger conditions the Milwaukee will be "a much strengthened competitor, realistically vying for long haul traffic at every major point served by Northern Lines" (App. 31); and (3) the absence here of a monopoly situation such as that at Tampa, Florida.

The Commission, in the Second Report, explicitly recognized that certain rail competition would be "eliminated"

16. After the merger the Pacific Northwest will have four strong direct-route services: (1) The merged company's lines; (2) Union Pacific System; (3) Milwaukee Railroad Lines; and (4) Southern Pacific direct to large Oregon areas. Also there are three other transcontinental routes at competitive through rates: (1) Canadian Pacific-Soo Line routes via Canada; (2) Southern Pacific routes via Portland; and (3) Western Pacific routes via Bieber, California, with W.P. connections with other roads including Santa Fe.

and "reduced" (App. 316), but it carefully analyzed those effects and put them in proper perspective. As the Commission concluded, this merger, with the prescribed conditions that will create new east-west and north-south rail competition, "presents an entirely new perspective for intramodal competition in the efficient and economical movement of transcontinental, western and Pacific Coast traffic" (App. 331).

B. Other modes. The opinion of the District Court indicates that the Commission's evaluation of the vigorous and ever-growing intermodal competition in this part of the country is supported by ample and detailed evidence (App. 34-36). As noted before, one of the witnesses for these shipper-appellees was the chairman of the Northwest Fish Traffic Committee, representing twenty-five major shippers (Tr. 7157). He pointed out the market pressures on fish products transported to distant points and revealed that "At the present time the trucks, because of faster schedules and lower costs, have 50 percent of our Midwest business" (Tr. 7158).[17] He supported the merger and conditions for the Milwaukee Road (Tr. 7157-7159). Another witness for our shipper-appellees presented evidence of: the diversion of freight from rail to other modes; the competitive truck routes and inter-coastal barge routes used; the new super highways; the competitive effects of the private or exempt truckers; the merging of truck lines to offer coast-to-coast service; the rail freight rate cuts to meet barge and truck competition; and comparative rail-truck transportation costs (Ex. 103, pp. 8-26).

17. He also explained on cross-examination that since fish is an exempt commodity "we can ship at any rate that we can get out of the trucks . . ." (Tr. 7163). Most of the major transcontinental truck lines haul vast amounts of exempt freight (Ex. 103, pp. 19-20).

The District Court noted some examples of what the evidence of other shippers revealed about truck competition on every type of traffic:

> "Numerous witnesses, principally shippers, described substantial incursions by motor carriers into railroad traffic in paper products, steel, cement, fruit, grain, *et cetera*. See, *e.g.*, Tr. 5754, 11836, 9527, 7224, 8023, respectively." (App. 35)

> "Shipper testimony revealed a wide range of reasons for the switch to motor carriers—lower costs, better service, more flexible routing, faster delivery. The manner in which trucks have managed to undercut the railroads in one or another facet of almost every submarket illustrates the fungibility of rail and motor transport." (App. 36)

Furthermore, the intense truck competition, alone and in combination with water carriers, aggravates the serious imbalance of east-west rail traffic in this area of the nation:

> "As the Commission also points out [App. 253-254] there is an imbalance of traffic. Historically the West has been a market for the finished products of the Midwest and the East and a supplier to those areas of basic raw materials. Its lower-rated traffic in its long haul east is not as vulnerable to incursions by intermodal competitors of Northern Lines as is the higher-rated manufactured traffic moving into the area served by Northern Lines. The latter, both from the east and from the West Coast is vulnerable to motor carrier competitors and others. It is this traffic which the rail carriers must retain to balance their operations." (App. 12)

The Department emphasizes in generalized terms the competition that helped bring "New types of service such as special cars and rail-truck piggyback service . . ." (D.J. Br. 65). Yet it is well known that those developments have been largely due to the very truck and other

intermodal competitors that the Department would dismiss.[18]

CONCLUSION

The evidence and findings concerning shipper and public benefits show why this conditioned merger is, as the Commission held, "entirely consistent with the public interest" (App. 344). The shippers and the public in the Northwest need those benefits.

The District Court was clearly correct and its judgment should be affirmed.

Respectfully submitted,

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18. See, *e.g.*, *Substituted Service–Piggyback*, 322 I.C.C. 301, 305-309 (1964), affirmed *sub nom. American Trucking Associations, Inc. v. Atchison, T.&S.F.R. Co.*, 387 U.S. 397, 401 (1967); *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 95 (1954); *Liquefied Petroleum Gas in Jumbo Tank Cars*, 319 I.C.C. 31, 40 (1963).